No. 1223

IN THE

Supreme Court of the United States

OCTOBER TERM 1942

DANIEL J. HOULIHAN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

ARTHUR GARFIELD HAYS,
Solicitor for Petitioner.

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TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, DANIEL J. HOULIHAN, respectfully represents:

I. On July 2, 1941, the Grand Jury for the Southern District of New York, found an indictment charging the petitioner in one count with violation of the Selective Training and Service Act of 1940 (Section 311, Title 50 of the United States Code).

II. On September 11, 1941 said petitioner was convicted in the United States District Court for the Southern District of New York, after trial before the Honorable John Bright and a jury, on the single count of the aforesaid indictment, and the petitioner was sentenced on September 15, 1941 to imprisonment for two years.

III. The indictment charged the petitioner with an offense as follows:

> "That heretofore, to wit, beginning on or about the 16th day of September, 1940, and continuing thereafter up to and including the date of the filing of this indictment, at the Southern District of New York and within the jurisdiction of this Court, and at divers other places to the Grand Jurors unknown, Francis M. O'Connell, James J. O'Connell and Daniel J. Houlihan, the defendants herein, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together, and with each other, and with divers other persons to the Grand Jurors unknown, to evade the requirements of the Selective Training and Service Act of 1940, and the rules, regulations and directions made pursuant thereto, and to counsel, aid and abet the defendant Francis M. O'Connell to evade service in the land and naval forces of the United States, in the manner and by the means hereinafter set forth" (Record, p. 6).

IV. Upon the trial, at the conclusion of the Government's case, and again at the conclusion of the trial itself, counsel for the petitioner moved for a dismissal of the indictment on the ground that the conspiracy as alleged therein did not constitute a violation of Section 311 of Title 50 of the United States Code as charged in the indictment. These motions were denied.

The Selective Training and Service Act of 1940 was drafted to follow closely the provisions of the Selective Draft of 1917. (The Draft Act of 1917 included no specific penalty for the punishment of those who might conspire to evade that law.) In the 1940 Act there was inserted a provision covering punishment for those persons "who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or *conspire to do so*". (Italics ours.) No allegation was made nor proof adduced at the trial that the petitioner had conspired to hinder or interfere in any way by force or vio-

lence with the administration of the Act, and it was the contention of the Government throughout that no such allegation or proof was necessary. Prior to the 1940 Act conspiracies were punishable under Title 18, Section 88, and still are.

V. On September 19, 1941 petitioner duly appealed from the aforesaid judgment of conviction to the United States Circuit Court of Appeals for the Second Circuit.

VI. On March 24, 1942 the United States Circuit Court of Appeals for the Second Circuit unanimously affirmed the conviction, the opinion being rendered by the Honorable Augustus N. Hand, Circuit Judge, who in referring to that part of the Selective Service Act of 1940 under which the petitioner was indicted, said:

> "The question of chief importance is whether Section 11 of the Selective Training and Service Act is restricted by its terms to conspiracies to 'hinder or interfere in any way by force or violence with the administration of the Act'. While the terminology of Section 11 is awkward and not as perfectly clear as we might wish, nevertheless we think that conspiracies to violate any of the substantive offenses described in the section are within its purview."

The opinion is printed in full in the record submitted herewith (Record, pp. 460-466).

Statement of Jurisdiction

The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 [United States Code, Title 28, Section 347 (a)].

Question Presented

The following is the question presented by the petitioner:

I. Does a conspiracy to evade the Selective Training and Service Act of 1940, other than by use of force or violence, constitute a violation of Section 311 of Title 50 of the United States Code?

The opinion of the United States Circuit Court of Appeals, Second Circuit, admits that the language of this section is "awkward" and "not as perfectly clear" as the Court might wish. This is a criminal statute and the rule of strict construction must be applied. There are no reported cases known to your petitioner construing this section of this particular law. A clarification of the penalties under this important Federal statute cannot be had except by decision of this Court.

Reasons for Granting the Writ

Your petitioner respectfully urges, as will be more fully argued in the brief accompanying this petition, the following reasons why this application for a writ of certiorari should be granted:

I. The decision of the United States Circuit Court of Appeals, Second Circuit, deals with the interpretation of a Federal statute of importance and universal interest particularly at the present time. There being no common law crime against the Government, each case of necessity involves the construction of a Federal statute, and no one can be punished for a crime against the United States unless facts shown plainly and unmistakably constitute an offense within the meaning of the Act of Congress.

> *Specter* v. *United States*, 42 Fed. (2d) 937, 940; *United States* v. *Noveck*, 271 U. S. 201, 204.

The Supreme Court has had no occasion to render any decision specifically construing the penal provisions of the Selective Service Act of 1940.

II. The decision of the United States Circuit Court of Appeals for the Second Circuit construes the Statute in question in favor of the Government and against the party accused, which is directly contrary to the rule of construction in the case of ambiguities arising in penal statutes. The Supreme Court has repeatedly held that a criminal statute must be fixed and certain as to the crimes and offenses which it proposes to define; a criminal statute cannot rest upon an uncertain foundation. The opinion of the Circuit Court of Appeals for the Second Circuit in the instant case makes no finding as to the definiteness of the meaning of the section of the Federal statute involved. On the contrary, the Court merely states "* * * nevertheless we think the conspiracies to violate any of the substantive offenses described in the section are within its purview".

The opinion of the United States Circuit Court of Appeals in the instant case is in conflict, as to the construction of criminal statutes, with the decisions of and principles laid down in a long line of cases decided by this Court and of other Circuit Courts of Appeals, all of which hold that Federal crimes exist only by virtue of Federal statutes and that "no one may be required at peril of life, liberty and property to speculate as to the meaning of Federal statutes. All are entitled to be informed what the State commands or forbids". *Lanzetta* v. *New Jersey*, 306 U. S. 451. Among this line of cases are the following:

United States v. *Cohen Grocery Co.*, 255 U. S. 81;
Connally v. *General Construction Co.*, 269 U. S. 385;
Cline v. *Frink Dairy Co.*, 274 U. S. 445;
Fasulo v. *United States*, 272 U. S. 620;
Snitkin v. *United States*, 265 Fed. 489, C. C. A. (7th) 1920;
Gessel v. *United States*, 1 Fed. (8th) 283 C. C. A. (8th) 1924;

Speeter v. *United States*, 42 Fed. (2d) 937 C. C. A. (2nd) 1930;
First National Bank of Anamoose v. *United States*, 206 Fed. 374 C. C. A. (8th) 1913.

WHEREFORE, your petitioner prays that a writ of certiorari may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court for review and determination, as provided by law, this cause and a complete transcript of the record and of all proceedings had therein; and that the order of the United States Circuit Court of Appeals affirming the judgment in this cause may be reversed and that the petitioner may have such other and further relief in the premises as this Court may deem appropriate.

Dated: New York, New York, May 6, 1942.

DANIEL J. HOULIHAN,
Petitioner.

Verification for the Petition

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK.

DANIEL J. HOULIHAN,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

State of New York,
County of New York, } ss.:

DANIEL J. HOULIHAN, being duly sworn, says:

I am the petitioner herein. I have read the foregoing petition by me subscribed and know the contents thereof. The facts therein stated are true to the best of my knowledge, information and belief.

DANIEL J. HOULIHAN.

Sworn and subscribed to before
me this 6th day of May, 1942.

FREDERICK GRIFFIN,
Notary Public, New York County.
N. Y. Co. Clks. No. 346, Reg. No. 2G351.
Kings Co. Clks. No. 169, Reg. No. 2254.
Bronx Co. Clks. No. 45, Reg. No. 186G42.
Queens Co. Clks. No. 811, Reg. No. 2523.
Commission expires March 30, 1942.

Attorney's Affidavit

State of New York,
County of New York, } ss.:

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that in my opinion it is well founded and the cause is one in which the petition should be granted.

ARTHUR GARFIELD HAYS.

Sworn and subscribed to before
me this 6th day of May, 1942.

FREDERICK GRIFFIN,
Notary Public, New York County.
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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Jurisdiction

The jurisdiction of this Court is invoked under provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 [U. S. Code, Title 28, Section 347 (a)].

Statement of the Case

The facts have been set forth in the foregoing petition.

SUMMARY OF ARGUMENT

POINT I

A conspiracy to evade the Selective Training and Service Act of 1940, other than by the use of force or violence, does not constitute a violation of Section 311 of Title 50 of the United States Code.

ARGUMENT

POINT I

A conspiracy to evade the Selective Training and Service Act of 1940, other than by the use of force or violence, does not constitute a violation of Title 50, Section 311 of the United States Code.

The petitioner, Daniel J. Houlihan, was indicted, tried, convicted and sentenced upon a charge of conspiring to violate what is commonly known as the Selective Training and Service Act of 1940 (Title 50, Section 311, U. S. Code). The indictment charged that Daniel J. Houlihan conspired with Francis M. O'Connell and James M. O'Connell to enable Francis M. O'Connell, one of the persons subject to the Act, to evade service with the armed forces of the United States. Upon the argument of the motions to dismiss the indictment and throughout the case the petitioner contended that the only conspiracy punishable under the Selective Service Act is one where force or violence is to be used. The contention of the Government is that the particular section of the Act makes any conspiracy to violate it a crime punishable thereunder. In accordance with this contention, the Government made no effort to introduce any evidence proving that the conspiracy was one to hinder or interfere with the administration of the Selective Service Act, by force or violence.

Inasmuch as there are no reported decisions involving the construction of this section of the law, it seems proper to refer to analogous previous legislation (*Thompson* v. *Thompson*, 218 U. S. 611). During the last war a Selective Service Draft Act was enacted in 1917 and amended and recorded in 1918 as Chapter 15, Paragraph 6, 40 Stat. 80 (Comp. Stat. 1918, Par. 2044F).

The statutes of 1917 and of 1940 are shown in parallel as follows: They differ only in the words set forth in bold type.

Selective Draft Act of 1917, Title 50, Section 206, United States Code. (Appendix)

OFFENSES AND PUNISHMENT

Any person charged as herein provided with the duty of carrying into effect any of the provisions of this Act or the regulations made or directions given thereunder who shall fail or neglect to perform such duty; and any person charged with such duty or having and exercising any authority under said Act, regulations, or directions, who shall knowingly make or be a party to the making of any false or incorrect registration, physical examination, **exemption, enlistment**, enrollment, or muster; and any person who shall make or be a party to the making of any false statement or certificate as to the fitness or liability of himself or any other person for service under the provisions of this Act, or regulations **made by the President thereunder**, or otherwise evades or aids another to evade the requirements of

Selective Training and Service Act of 1940—Title 50, Section 311, United States Code.

OFFENSES AND PUNISHMENT

Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the **rules or** regulations made or directions given thereunder, who shall **knowingly** fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, **rules,** regulations, or directions who shall knowingly make, or be a party to the making, of any false, **improper,** or incorrect registration, **classification,** physical **or mental** examination, **deferment, induction,** enrollment, or muster, and any person who shall **knowingly** make, or be a party to the making of, any false statement or certificate as to the fitness **or unfitness** or liability **or non-liability** of himself or any other person for service under the provisions of this Act, or **rules,** regulations, **or directions made pursuant thereto,** or

this Act or of said regulations, or who, in any manner, shall fail or neglect **fully** to perform any duty required of him in the execution of this Act, shall, **if not subject to military law, be guilty of a misdemeanor,** and upon conviction in the District Court of the United States having jurisdiction thereof, be punished by imprisonment for not more than **one year,** or, if subject to military law, **shall be** tried by court-martial and suffer such punishment as a court-martial may direct. **May 18, 1917, c. 15, Sec. 6, 40 Stat. 80.**

Pertinent Change

Pertinent Change

who otherwise evades **registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels,** aids, **or abets** another to evade **registration or service in the land or naval forces or any of** the requirements of this Act, or of said **rules,** regulations, **or directions,** or who in any manner shall **knowingly** fail or neglect to perform any duty required of him **under or** in the (execution of this Act, **or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall upon conviction** in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than **five years or a fine of not more than $10,000,** or **by both such fine and imprisonment,** or if subject to military **or naval** law **may be** tried by court martial, **and, on conviction, shall** suffer such punishment as a court martial may direct. **No person shall be tried by any military or naval court martial in any case arising**

under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under the laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act. Sept. 16, 1940, 3:08 p.m. E.S.T. c. 720, Sec. 11, 54 Stat.

Thus the only phrase in Title 50, Section 311 which refers to conspiracy was inserted in the law:

> "* * * or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so * * *."

This is the only place in the entire section where "persons" are referred to. It is now claimed by the Government that the last phrase above ("or conspire to do so") covers the entire section of the Act of 1940 from the beginning.

The section itself begins with the wording "any person" and is followed by "and any person", until the section comes to that part of the Act dealing with conspiracy and then it refers to "persons" knowlingly interfering or hindering by force or violence, with the administration of the Act, or conspiring to do so. It is rather to be assumed that Congress intended what this means in good English and not that it used bad grammar. The plural form of the verb is used—"conspire"—rather than the singular "conspires", and by the use of this plural form the reasonable construction is that the conspiracy referred to is by the "persons who hinder

* * * by force or violence". If this conspiracy clause relates all the way back to "any person", the verb necessarily would be "conspires", as the subject is in the singular.

If Congress had intended to include a provision in the Act itself making it a crime to conspire, without force or violence, to interfere with the administration of the Act, the words "or otherwise" could easily have been inserted after the phrase "by force or violence". This was not done. There were other simple ways in which the Congress could have made clear that it intended to provide in the Act itself for the punishment of conspiracies to violate its provisions generally; for example, by inserting at the conclusion of the entire paragraph such words as "or any person or persons who conspire to violate any of the foregoing provisions of this section, shall upon conviction" etc. * * *.

As noted above, the Act of 1940 differs from the prior draft legislation in two principal points: First, as to the penalty. The maximum punishment under the Act of 1917 was imprisonment for one year, whereas under the Act of 1940 it is for a term of five years. Secondly, no provision was contained in the Act of 1917 providing for punishment of a conspiracy to violate the Act by any specific means set forth therein, whereas the Act of 1940 at a point near the end of the section includes the conspiracy provision hereinbefore recited. Because of the failure in the 1917 Act to provide for punishment for conspiracy to hinder the administration of the Act by force or violence, it was necessary to prosecute such conspirators under the General Conspiracy statute, being Title 18, Section 88 of the U. S. Code (*Hammerschmidt* v. *United States*, 265 U. S. 182; *Gruher* v. *United States*, 255 Fed. 474; *United States* v. *Galleanni*, 245 Fed. 977; *Firth* v. *United States*, 253 Fed. 36). This General Conspiracy statute, however, provided for a maximum penalty of imprisonment for a term of two years, which penalty was apparently regarded as inade-

quate in cases involving a willful conspiracy to obstruct, *by force or violence* the enforcement of the Selective Draft Act of 1917. Resort was then had to Title 18, Section 6, commonly known as the "Seditious Conspiracy Act", providing the maximum imprisonment of six years (*Reeder* v. *United States*, 262 Fed. 36; certiorari denied 252 U. S. 581; *Enfield* v. *United States*, 261 Fed. 141). Thereafter, following the declaration of war by the United States in 1917, the Espionage Act, Title 50, Sections 32-34, was enacted which punished conspiracies to willfully obstruct recruiting or enlistment with a maximum penalty of twenty years' imprisonment. Some confusion arose by reason of the two statutes in the United States Code under which prosecutions could be maintained for conspiring to interfere by force or violence with the Selective Draft Act of 1917. It was finally determined in *Haywood* v. *United States*, 268 Fed. 795, certiorari denied 256 U. S. 689, that a conspiracy by force or violence to obstruct the enforcement of the Selective Draft Act, was properly prosecuted under the Espionage Act, which fixes punishment of twenty years' maximum imprisonment, rather than by a prosecution under Title 18, Section 6 (Seditious Conspiracy) which provided for only a six-year maximum sentence.

When the Selective Service Act of 1940 was enacted, this country was not at war. The provisions of the Espionage Act, Title 50, Section 34, were therefore inapplicable. Some punishment more drastic than the one prescribed under the General Conspiracy Act, Title 18, Section 88, carrying with it a two-year penalty, was desired. There was therefore incorporated in the Act of 1940 a provision that conspiracies to hinder the administration of the Act by force or violence were punishable with a sentence equal to that meted out for the specific violations of the Act, namely, imprisonment for five years. Through experience in the enforcement of the previous Selective Draft legislation in 1917, it had been found

necessary to regard conspiracies employing force or violence as offenses equal in gravity and severity with the substantive violations themselves. It is the contention of the petitioner, however, that this did not extend to an ordinary conspiracy without force or violence, and the Statute does not so provide.

In *Fasulo* v. *United States*, 272 U. S. 620, in an opinion by Mr. Justice Butler, it is said at page 629:

> "There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute."

The Selective Service Act of 1940 is an all important statute affecting the lives of every American family. It is therefore regarded as of the highest importance that the construction of this law be clarified and finally determined.

Conclusion

This Court has repeatedly held that a penal statute must be definite and certain so that no one may be required in peril of life, liberty or property, to speculate as to its meaning. It is respectfully submitted that the meaning and effect, and particularly of the penal provisions of the Selective Training and Service Act of 1940, Section 311, Title 50, should be determined by this Court and that therefore the question involved in this application is of sufficient importance to require an exercise of this Court's supervisory jurisdiction by writ of certiorari.

Respectfully submitted,

Arthur Garfield Hays,
Solicitor for Petitioner.

Seymour M. Heilbron,
of Counsel.

APPENDIX

Statute Involved

Selective Training and Service Act of 1940—Title 50, Section 311, United States Code:

> Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or non-liability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or

naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act. Sept. 16, 1940, 3:08 p.m., E.S.T., c. 720, § 11, 54 Stat. 894.

Statutes Referred To

Selective Draft Act of 1917, Title 50, Section 206 (Appendix), United States Code:

Any person charged as herein provided with the duty of carrying into effect any of the provisions of this Act or the regulations made or directions given thereunder who shall fail or neglect to perform such duty and any person charged with such duty or having and exercising any authority under said Act, regulations, or directions, who shall knowingly make or be a party to the making of any false or incorrect registration, physical examination, exemption, enlistment, enrollment, or muster; and any person who shall make or be a party to the making of any false statement or certificate as to the fitness or liability of himself or any other person for service under the provisions of this Act, or regulations made by the President thereunder, or otherwise evades or aids another to evade the requirements of this Act or of said regulations, or who, in any manner, shall fail or neglect fully to perform any duty required of him in the execution of this Act, shall, if not subject to military law, be guilty of a misdemeanor, and upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, or, if subject to

military law, shall be tried by court-martial and suffer such punishment as a court-martial may direct. May 18, 1917, c. 15, § 6, 40 Stat. 80.

General Conspiracy Act, Title 18, Section 88, United States Code:

(Criminal Code, section 37.) Conspiring to commit offense against United States. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both. (R. S. § 5440; May 17, 1879, c. 8, 21 Stat. 4; Mar. 4, 1909, c. 321, § 37, 35 Stat. 1096.)

Seditious Conspiracy Act, Title 18, Section 6, United States Code:

(Criminal Code, section 6.) Seditious conspiracy. If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined not more than $5,000, or imprisoned not more than six years, or both. (R. S. § 5336; Mar. 4, 1909, c. 321, § 6, 35 Stat. 1089.)

Title 50, United States Code, Sections 33 and 34; Espionage Act:

§ *33. Seditious or disloyal acts or words in time of war.* Whoever, when the United States is at war,

shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both. (June 15, 1917, c. 30, Title I, § 3, 40 Stat. 219; Mar. 3, 1921, c. 136, 41 Stat. 1359.)

§ *34. Conspiracy to violate preceding sections.* If two or more persons conspire to violate the provisions of sections 32 or 33 of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. Except as above provided conspiracies to commit offenses under this chapter shall be punished as provided by section 88 of Title 18. (June 15, 1917, c. 30, Title I, § 4, 40 Stat. 219.)

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1223

DANIEL J. HOULIHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 460–465) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered April 9, 1942 (R. 465–466). The petition for a writ of certiorari was filed May 7, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether a conspiracy to evade military service is a violation of Section 11 of the Selective Training and Service Act of 1940.

STATUTE INVOLVED

Section 11 of the Selective Training and Service Act of 1940, c. 720, 54 Stat. 885, 894 (50 U. S. C. 311), provides:

> Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or

abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

STATEMENT

Petitioner and two others were indicted in one count for violation of Section 11 of the Selective Training and Service Act of 1940, 54 Stat. 885, 894 (50 U. S. C. 311). The indictment alleged that the defendants unlawfully, wilfully, and knowingly conspired and agreed to evade the requirements of the Act and the rules and regulations made pursuant thereto in counseling, aiding, and abetting Francis M. O'Connell, a person required to register thereunder, to evade service in the land and naval forces of the United States (R. 6–8). At the trial the Government introduced evidence

showing that the defendants had conspired to bribe a Selective Service investigator in order to procure a deferment for the defendant Francis M. O'Connell, but there was no evidence that the defendants had conspired to interfere with the administration of the Act by force or violence. The defendants were found guilty (R. 426) and petitioner was sentenced to two years' imprisonment (R. 431). On appeal to the Circuit Court of Appeals for the Second Circuit the convictions were affirmed (R. 460–465). Only the petitioner has applied for a writ of certiorari.

ARGUMENT

Petitioner does not challenge the sufficiency of the evidence or otherwise dispute the fact that he is guilty of participation in a conspiracy to violate the provisions of the Selective Training and Service Act of 1940 (see R. 464). His sole contention is that Section 11 of the Act prohibits only conspiracies to hinder the administration of the Act by force and violence and does not punish conspiracies to commit other substantive offenses (Pet. 10–16). We submit that both the substantial purpose and the words of the statute show that the court below correctly rejected this interpretation.

Section 11 shows on its face that its purpose is to punish, and thereby prevent, all interferences with the operation of the selective service system. The natural first step to take in accomplishing that object was to define the substantive offenses

which would interfere with the operation of the selective service system. Congress took that step; it listed the offenses and placed all of them on an equal footing, thus showing that, contrary to the petitioner's contention (Pet. 15–16), it did not view the offense of obstructing the administration of the Act by force and violence as more serious than the others. The natural second step for Congress to take to carry out the broad purpose was to outlaw all conspiracies to commit any of the substantive offenses prohibited by the Act. To do this a new and express provision was necessary for several reasons. Experience in 1917 and 1918 had shown that although Section 37 of the Criminal Code (18 U. S. C. 88) punished conspiracies to violate the draft laws when there was an overt act, nevertheless it was not always desirable to bring such prosecutions under the general conspiracy statute, probably because the penalty was not sufficiently severe.[1] Section 4 of the Espionage Act (50 U. S. C. 34) was not applicable when the Selective Service Act of 1940 was drafted, because the country was not at war.[2] And Section 6 of the Criminal Code (18 U. S. C. 6) proscribes conspiracies to obstruct the operation of the Selec-

[1] This conviction cannot be sustained under that section because no overt act was alleged in the indictment (see R. 465).

[2] As to the applicability of this section in wartime, see *Haywood* v. *United States*, 268 Fed. 795 (C. C. A. 7), certiorari denied, 256 U. S. 689.

tive Service Act only where the use of force is contemplated. In view of these statutory provisions there was little or no reason for Congress to deal specifically, as petitioner contends it has done (Pet. 15), with conspiracies to obstruct the operation of the Act by force and violence; to do so would have been to duplicate Criminal Code, Section 6,[3] and such conspiracies would, in any event, be rare. On the other hand, the necessary and natural step for Congress to take in carrying out the general purpose of Section 11, was to punish any conspiracy to commit a substantive offense defined by the Act, treating all such conspiracies equally just as it treated equally the substantive offenses.

We submit that Congress took this step when in Section 11 it added to the list of prohibited acts the disjunctive phrase "or conspire to do so." The comma, which separates that phrase from the clause "or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto," would not have been deliberately inserted[4] to separate the two, had it not been intended that

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[3] For an example of the use of Section 6, see *Reeder* v. *United States*, 262 Fed. 36 (C. C. A. 8), certiorari denied, 252 U. S. 581.

[4] The conjunction "or" is employed 47 times in Section 11 and in only 20 instances is it preceded by a comma. It is evident, therefore, that the punctuation employed was used advisedly and intended to have significance.

the phrase "or conspire to do so" should condemn a conspiracy to commit any of the offenses denounced in the preceding portions of the section. Furthermore, apart from the punctuation of the statute, it is the settled rule that "when several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Porto Rico Ry. Co.* v. *Mor,* 253 U. S. 345, 348. See also, Lord Bramwell in *Great Western Ry. Co.* v. *Swindon &c. Ry. Co.,* L. R. 9 App. Cas. 787, 808; *United States* v. *Standard Brewery,* 251 U. S. 210, 218; *Chicago and N. W. Ry. Co.* v. *Booten,* 57 F. (2d) 786, 799 (C. C. A. 8); *In re Graves' Estate,* 27 F. Supp. 717, 719 (W. D. Ky.). Petitioner asserts (Pet. 13–14) that the use of the plural verb "conspire" forbids this interpretation but, as the court below pointed out (R. 464), although Section 11 begins with the singular noun "any person," the plural form "any person or persons" appears later in the section so that the verb "conspire" has various subjects, some singular and some plural, making use of the plural form natural and not incorrect.

Petitioner asserts that the decision below conflicts with the line of decisions holding that a criminal statute, to be valid, must define with certainty what it forbids. E. g. *United States* v. *Cohen Grocery Co.,* 255 U. S. 81. Obviously, those

cases have no application here. Nor does the contention that he is entitled to be warned of whether his act is a crime come well from a defendant who deliberately embarked on a course of conduct which would lead to violations of other well known criminal statutes.

CONCLUSION

The case was correctly decided below and there is neither a conflict of decisions nor any question of general importance. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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